THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0454

Jane Doe

v.

Lori Shibinette, Commissioner
New Hampshire Department of Health and Human Services

SUPREME COURT RULE 7 APPEAL FROM THE JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

REPLY BRIEF OF THE APPELLANT

LORI SHIBINETTE, COMMISSIONER
NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

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Fifteen Minute Oral Argument Requested

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ARGUMENT

I. AN "INVOLUNTARY EMERGENCY ADMISSION" OCCURS WHEN A PERSON IS PHYSICALLY ADMITTED TO A RECEIVING FACILITY.

As set forth in the Commissioner's opening brief, the statutory language, context, and structure unambiguously demonstrate that an involuntary emergency admission ("IEA") to the state mental health services system under RSA 135-C:31, I, occurs when a patient is physically admitted to a receiving facility. DB17-38.[1] The appellee and the *amici* resist this conclusion, arguing that the "statutory scheme" reveals that an IEA actually occurs the moment an IEA certificate is executed. They identify no statutory language supporting this position, and no such language exists.

Rather, the appellee's statutory analysis jumps straight from the statement in RSA 135-C:28, I, that an IEA "shall be to the state mental health services system" to language in RSA 135-C:29 regarding law enforcement custody and transport. *See* PB14-15. The *amici* hospitals ("the hospitals") cite RSA 135-C:28 for the proposition that an "admission occurs upon the execution of an IEA certificate by a physician or APRN who is approved by a DRF under the supervision of the Commissioner,"

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[1] "DB__" refers to the Commissioner's brief.
"DD__" refers to the addendum attached to the Commissioner's brief.
"DA__" refers to the Commissioner's appendix.
"DSA__" refers to the supplemental appendix attached to this reply.
"PB__" refers to the appellee's brief.
"AB__" refers to the federal class plaintiffs' *amicus* brief.
"HB__" refers to the hospitals' *amicus* brief.
"NB__" refers to NAMI's *amicus* brief.
"HA__" refers to the hospitals' appendix.

HB10, 11, but the statute does not say that. *See* RSA 135-C:28, I ("The admission *may be ordered* upon the certificate of an approved physician, approved PA, or approved APRN ….") (emphasis added). The federal class *amici* ("the class *amici*") spend much of their brief lecturing the Commissioner without meaningfully attempting to explain how the statutory text supports their view. And the only discussion of the statutory language in NAMI's brief is two sentences of excerpts from RSA 135-C:29, I, and RSA 135-C:31. *See* NB26.

Without any textual hook, the appellee and the *amici* argue that the legislature did not contemplate a lack of system capacity when it passed RSA chapter 135-C. This argument only undermines their position. RSA chapter 135-C consistently uses "admission," "admit," and "admitted" to refer to the act of physically admitting a person *to* a receiving facility. *See* DB19-22. As the hospitals note, the only reason one need consider their alternative definition is if a patient cannot be immediately transported to a receiving facility. HB16. In this case, the trial court found that the appellee could not be immediately transported "due to a lack of the system's bed space …." DD53. But if the legislature did not contemplate that lack of bed space when it passed RSA chapter 135-C, then there is no reason to believe it ever intended to deviate from the common understanding of the word "admission."

Perhaps cognizant of this fact, the hospitals turn to RSA 135-C:29, I, which states that, "[u]pon completion of an [IEA] certificate … a law enforcement officer shall … take custody of the person to be admitted and shall immediately deliver such person to the receiving facility identified in the certificate." The hospitals contend this language requires the

Commissioner to immediately take a person into custody and transport that person to a receiving facility upon completion of an IEA certificate. HB15-20. The hospitals thus argue that the Court need not determine *when* an IEA occurs for the purposes of RSA 135-C:31 at all. HB16. This argument is perhaps unsurprising, given that RSA 139-C:29, I, itself refers to the "completion of an [IEA] certificate" in the past tense and the "person to be admitted" in the future tense.

But it is also incorrect. Under RSA 135-C:29, I, *law enforcement*, not the Commissioner, takes individuals into custody. *See also* RSA 135-C:62 & :63. Moreover, RSA 135-C:29, I, uses the word "immediately" solely to modify the act of transporting a person to a receiving facility *once custody is taken*. It intentionally uses no similar modifier when discussing the act of taking custody in the first place. Other provisions within RSA chapter 135-C contemplate that time may pass between when an IEA certificate is executed and when a person is taken into custody. *See* RSA 135-C:29-a, I & II. Thus, RSA 135-C:29 only requires immediate transport *once custody taken*; it does not mandate that law enforcement (much less the Commissioner) immediately take a person into custody whenever a private physician, PA, or APRN executes an IEA certificate.

Yet, even if such a mandate existed, it could not trump the "inherent constitutional limitations on the authority of the executive branch to expend public funds." *Petition of Strandell*, 132 N.H. 110, 116 (1989). This constitutional limitation exists *regardless* of whether it is also reflected in the statutory text. *See id.* The Commissioner can only increase capacity within the system when the legislature provides her the resources do to so. She is thus not just permitted to restrict access to services within that

system when there is insufficient capacity to provide those services; it is constitutionally required. *See id.* at 115 ("[T]he executive branch may expend public funds only to the extent, and for such purposes, as those funds may have been appropriated by the legislature.").

This Court should also reject any argument that constitutional avoidance compels the trial court's construction. "The preference for avoiding constitutional adjudication does not justify disregarding unambiguous language." *Polonsky v. Town of Bedford*, 171 N.H. 89, 96 (2018) (citations omitted). Here, the statutory language, structure, and context unambiguously support the Commissioner's construction. In contrast, the constitutional arguments raised by the appellee and the *amici* necessarily assume that a person is within the Commissioner's custody and control upon the execution of an IEA certificate. The Commissioner disputes this proposition, and it is not supported by the statutory text. *See* DB27-32.[2]

Moreover, the trial court's construction *creates* significant constitutional issues. For one, it conflicts with the constitutional limits recognized in *Petition of Strandell*. Additionally, it places a person in state custody the moment an IEA certificate is executed. The appellee and *amici* argue that this custody is unconstitutional if a patient does not receive a probable cause hearing in a private hospital emergency department ("ED")

[2] The appellee's contention that a person is within state custody when a justice of the peace orders a mental examination under RSA 135-C:28, II is a red herring. To the extent any period of custody exists under RSA 135-C:28, II, it is temporary. Moreover, RSA 135-C:28, II itself provides legal process through the requirement that an IEA petitioner or law enforcement justify the request for a mental examination in writing. The appellee does not contend that this process is insufficient, nor that it places a person within the state mental health services system generally.

within three days of the execution of the IEA certificate.[3] The appellee would likely go even further and argue that it is also unconstitutional if a patient does not receive mental-health treatment in an ED following the execution of an IEA certificate. The Commissioner's construction, in contrast, does not create these constitutional problems in the first place.[4]

In short, the trial court's conclusion that an IEA occurs upon the execution of an IEA certificate lacks any textual basis, and the appellee and the *amici* provide no persuasive reason for this Court to affirm it. The Court should instead adopt the Commissioner's longstanding construction and reverse the trial court's judgment

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[3] Contrary to the appellee's contention, the trial court did not find that her *constitutional* rights had been violated, but rather based its ruling solely on its construction of RSA chapter 135-C itself. DD54-55.

[4] The constitutional claims pending in federal court do not alter this conclusion. If this Court adopts the Commissioner's construction, then those claims arise out of allegations that a Department employee at one time several years ago directed hospitals to detain individuals by filing successive IEA certificates. HB13; AB37-38. The Department disputes those allegations and has affirmatively represented for several years that a hospital may not detain a patient by dint of an IEA certificate alone. The allegations are thus not "facts," AB37, and they certainly do not demonstrate that the Commissioner's construction necessarily results in a "conflict with the constitution," *State v. Paul*, 167 N.H. 38, 45 (2014).

II. THE APPELLEE'S AND *AMICI*'S ARGUMENTS REVEAL THE UNWORKABILITY OF THEIR CONSTRUCTION.

Despite a lack of textual support, the appellee and the hospitals assert that the "statutory scheme" unambiguously supports the trial court's construction. *See, e.g.*, PB14-16; HB10-15, 30-31. The class *amici* go even further, contending that the Commissioner is "wasting time and taxpayers' money" defending her decades-long construction. CB40-41. According to the appellee and these *amici*, the Commissioner's construction is "strained," *see* HB10, 13, 31; CB31, and "defies the plain text of the relevant statutes," PB34. NAMI, though more equivocal, appears to endorse this view. *See* NB16-17, 26-28.

As discussed, these arguments are misguided. But it also bears emphasizing that the appellee and the *amici* themselves cannot agree on *how* to implement their construction in a way that does not render the state mental health services system effectively nonfunctional. They do not think through for the Court's benefit the practical consequences of their construction. Rather, they offer a series of individualized, inconsistent, and self-interested views that confirm their purportedly "straightforward" construction is in fact unworkable.

The appellee asks that this Court to uphold the trial court's order directing her release. PB44. She does not address that this outcome would result in a significant influx of similar orders. Rather, she presents the Commissioner with a series of hypothetical choices for how to implement the trial court's construction. PB43-44. She acknowledges those choices "might result in very bad outcomes for the individuals involved." PB44.

NAMI expresses alarm over the relief the appellee seeks. NAMI warns "that it would not be in the public interest to force release of patients who are, in fact, a danger to themselves or to others." NB28. NAMI accordingly asks that any relief this Court orders "be prospective, so that those bound by the Court's order will have adequate time to assure that dangerous patients are not released on a technicality." NB28. This request is incompatible with the relief the trial court ordered.

The hospitals similarly do not want courts ordering patients released for lack of probable cause hearings. Based largely on this concern, the hospitals asked the federal district court to require the Department to immediately take individuals subject to IEA petitions and certificates into custody upon execution of the certificate. *See* DSA20-49. They ask this Court to impose a functionally identical remedy. HB36-37. They know now, as they did then, that the system lacks capacity to immediately transfer every person subject to an IEA petition and certificate to a receiving-facility bed. It is thus no surprise that the appellee, who was actually subject to an IEA petition and certificate, PB9, and NAMI, whose mission "is to improve the lives of all people affected by mental illness and suicide," NB4, stop short of endorsing this extreme result.

The hospitals nevertheless argue that the Commissioner did not prove that the *appellee* could not be immediately transported to a receiving-facility bed when her IEA certificate was executed. HB22. This is incorrect. As noted, the trial court expressly found that "due to the system's *lack of bed space* [the appellee] was kept at Dartmouth Hitchcock's emergency room . . . ." DD53 (emphasis added). The circuit court's order following the appellee's probable cause hearing likewise reflects this fact. DA69.

Of course, the real purpose of this argument is to obscure the weaknesses in the hospitals' statutory construction and the harm that construction would cause to patients. If this Court simply ignores the lack of capacity in the system, then it need not consider whether the constitutional limitations recognized in *Petition of Strandell* apply. It can likewise disregard how a lack of system capacity necessarily renders the hospitals' construction of RSA 135-C:29, I, unworkable. And it might be more willing to swallow the hospitals' attempt to blame the Commissioner for *all* of the issues currently facing the mental-health system. *See, e.g.*, HB23-24.

But the Court should not ignore the critical role the legislature intended the *hospitals* to play in ensuring the success of the state mental health services system under RSA chapter 135-C. *See, e.g.*, RSA 135-C:3; RSA 135-C:26. It should not ignore the hospitals' *own* responsibility for the issues currently facing that system. *See generally* NB5-28. It should not ignore that the hospitals *themselves* can address the current capacity issues by choosing to become receiving facilities or choosing to provide actual treatment for emergent mental-health issues, rather than hoping to shuffle people into a state system that they know lacks the capacity to absorb them.[5] And it certainly should not ignore that the hospitals' construction

[5] To their credit, a few hospitals—Elliot Hospital, Franklin Hospital, and Portsmouth Regional Hospital—have chosen to be designated receiving facilities. If every other hospital in the State made the same choice in service of its community, then the state mental health services system would have enough capacity to treat all persons presently seeking admission and those persons would be more likely to receive care within their own communities.

would routinely place patients experiencing mental-health crises in state custody without anywhere to transport them for treatment.

Still, at least the hospitals' position is consistent. The same cannot be said for the class *amici*. On the one hand, they ask this Court to affirm the trial court's judgment "because [the appellee] did not receive a probable cause hearing within three days of her involuntary emergency admission." AB44. At the same time, they parrot the hospitals' contention that the Department must immediately take a person into custody upon the completion of an IEA certificate. *See* AB11, 31, 35, 37-38. They nonetheless acknowledge a lack of capacity in the system, AB37, and thus argue that the Commissioner can provide probable cause hearings in private hospital EDs, *see* AB39-41. In other words, the class *amici* cannot consistently articulate how best to promote their *own* interests under the statutory construction they advocate.

The class *amici* nonetheless propose several actions the Commissioner could take, many of which she lacks the ability to implement unilaterally. For instance, while the class *amici* suggest that the Commissioner can force private hospitals to hold probable cause hearings in their EDs, they point to no actual authority for that proposition and no such authority exists under RSA chapter 135-C. And even if it did, the class *amici* offer no persuasive explanation regarding how such a system would actually work. Instead, they denigrate the significant efforts the Department, the hospitals, and other interested stakeholders made during the ultimately unsuccessful pilot program in 2017. *See* AB16-17. (Notably, NAMI paints a far different picture of how those events unfolded. NB16-17.) The class *amici* also fail to mention the renewed efforts the

Department and hospitals undertook last year to try to facilitate probable cause hearings in EDs for IEA patients. Those efforts occurred under the cloud of COVID-19, which, as NAMI notes, has significantly complicated the challenges facing the system. *See* NB19-20. The class *amici* rejected those efforts because the proposed hearings would be by telephone, rather than by video.[6]

The class *amici*'s suggestion that the Commissioner can "secur[e] counsel for people in emergency rooms waiting transfer to DRFs [and] send[] IEA petitions to the Circuit Court to begin the hearing process," AB 40, is likewise misplaced. While the Department currently facilitates some of these services based on how the system presently operates, the statute does not obligate it to do so. If this Court adopts a construction significantly altering that system, these obligations will likely be beyond the Department's ability and resources to manage. They will instead fall on private petitioners, providers, hospitals, and the circuit court system to administer. *See, e.g.*, RSA 135-C:23; RSA 135-C:31.

Nor is the Commissioner obligated to "coordinat[e] transportation to and from hearings." AB40. Again, *law enforcement* bears that responsibility under the statute. *See* RSA 135-C:62; RSA 135-C:63. Moreover, the statute places no restriction on who can make a request for transport. *See* RSA 135-C:62; RSA 135-C:63. Thus, if transport were needed between a private hospital ED and a circuit court for a probable

[6] The Department undertook these settlement discussions in an attempt to address the human side of a complicated policy issue. They are no way a concession that such hearings are statutorily or constitutionally required. *See N.H. R. Ev.* 408.

cause hearing, then a hospital, an IEA petitioner, a circuit court, or even class counsel could make such a request.

The class *amici* also contemplate that patients will be transported back to private hospitals following probable cause hearings. AB40. They do not explain how the Commissioner could require a private hospital to agree to such an arrangement. In any event, this suggests that the class *amici* are comfortable with individuals being detained in private hospital EDs without appropriate mental-health treatment as long as probable cause is found. This is a view that the appellee—a member of the plaintiff class—does not appear to share.

Finally, the class *amici*'s suggestion that the Commissioner can simply place patients in "community-based treatment programs," AB40, confirms their misunderstanding of the statutory scheme. Such facilities, like private hospitals, must consent to be receiving facilities under RSA 135-C:26, I, to receive IEA patients. Moreover, a hospital may always rescind an IEA certificate and transfer a patient to such a program to the extent one will accept a patient's transfer. *See* RSA 135-C:29-a, I.

In sum, the appellee's and the *amici*'s fractured positions underscore the unworkability of the trial court's construction. If this Court adopts that construction, then it will exacerbate the problems currently facing the mental-health system, likely render the system nonfunctional, and harm the individuals RSA chapter 135-C is designed to help.

CONCLUSION

For the reasons stated above and in the Commissioner's opening brief, the Court should reverse the trial court's judgment.

Respectfully Submitted,

LORI SHIBINETTE, COMMISSIONER
NEW HAMPSHIRE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

By her Attorney:

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February 11, 2021

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CERTIFICATE OF COMPLIANCE

I, Samuel R.V. Garland, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this reply brief contains approximately 2,999 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

February 11, 2021 */s/Samuel R.V. Garland*
Samuel R.V. Garland

CERTIFICATE OF SERVICE

I, Samuel R.V. Garland, hereby certify that a copy of the State's reply brief shall be served on all counsel of record through the New Hampshire Supreme Court's electronic filing system or my e-mail.

February 11, 2021 */s/Samuel R.V. Garland*
Samuel R.V. Garland

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

John Doe, on behalf of himself and all others similarly situated, *et al*,	)	
v.	)	Civil Case. No. 1:18-CV-01039-JD
LORI SHIBINETTE, Commissioner of the New Hampshire Department of Health and Human Services, in his official capacity	)	

INTERVENORS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO PREVENT FURTHER STATUTORY VIOLATIONS

The Intervenor Plaintiffs (collectively, "the Hospitals") submit the following Motion for Temporary Restraining Order and Preliminary Injunction to Prevent Further Statutory Violations.

1. The Hospitals seek nothing more than the Defendant Commissioner's and the Department of Health and Human Service's compliance with existing statutory obligations. In Count V of their Amended Complaint (ECF 77), the Hospitals allege that the Commissioner has violated and will continue to violate RSA 135-C:27-33, the involuntary emergency admission scheme.

2. The Legislature established a process under which individuals who are an imminent threat to themselves or others are admitted involuntarily to the State's mental health system in a process called an "Involuntary Emergency Admission" or "IEA." *See* RSA 135-C:27-33.

3. Once an IEA certificate is completed by a Hospital's physician, PA or APRN, the patient is deemed admitted to the State mental health services system under the supervision of the Commissioner. RSA 135-C:28, I ("The involuntary emergency admission of a person shall

be to the state mental health services system under the supervision of the commissioner….The admission may be ordered upon the certificate of an approved physician, approved PA, or approved APRN….").

4. Because the IEA patient is part of the State's mental health system upon the signing of the IEA certificate and because the statutory scheme requires the patient to be transported immediately to a facility that can provide the specialized care warranted by the circumstances, the Hospitals attempt to arrange for the New Hampshire Hospital ("NHH") to transport the patient to the NHH or another designated receiving facility ("DRF"). RSA 135-C:29, I ("Upon completion of an involuntary emergency admission certificate under RSA 135-C:28, a law enforcement officer shall, except as provided in paragraph II, take custody of the person to be admitted and shall ***immediately*** deliver such person to the receiving facility identified in the certificate.") (emphasis added).

5. However, the Department of Health and Human Services ("Department") often requires that the Hospitals hold the IEA patient at their emergency departments until notified by the Department that the patient may be transported to a particular facility. Although already admitted to the state mental health system, an IEA patient may spend days or weeks in the Hospitals' emergency department before the Department directs the Hospitals to transport the IEA patient to a DRF.

6. RSA 135-C:31, I requires that a State Circuit Court conduct a hearing within three days of the patient's admission into the State mental health system to determine if there was probable cause for the IEA. *Id*. ("Within 3 days after an involuntary emergency admission, not including Sundays and holidays, and subject to the notice requirements of RSA 135-C:24, there shall be a probable cause hearing in the district court having jurisdiction to determine if there

was probable cause for involuntary emergency admission.").

7. As explained in the accompanying Memorandum of Law and affidavits, the Department[1] has not arranged for the prompt transportation of many IEA patients from the Hospitals' emergency departments to the NHH or a DRF and has not facilitated probable cause hearings within three days of the IEA certificates for many IEA patients, which has caused, is causing, and will continue to cause the Hospitals, the IEA patients, and the public to suffer irreparable harm.

8. Each day, there is a lengthy list of IEA patients located in the Hospitals' emergency departments awaiting transfer to the NHH or another DRF. The existence of this list, in and of itself, establishes that the Department is failing to immediately transport IEA patients, all patients of the state mental health system, from the emergency departments, as is required by statute.

9. The affidavits provided with the accompanying Memorandum of Law demonstrate that the Department's failure to satisfy the statutory requirements is persistent. The irreparable harms will not cease without an order from this Court compelling the Commissioner to comply with the law.

10. When the Department fails to arrange for a probable cause hearing within three days of the signing of an IEA patient's certificate, the State Circuit Court is now dismissing IEA petitions on this procedural basis alone. Patients who are a danger to themselves or others are therefore being release back into the community, a result the Legislature specifically sought to avoid. These dire circumstances will perpetuate unless the Department is enjoined to act in accordance with the statute.

[1] The named Defendant is the Commissioner. The Hospitals at times refer to the Commissioner and the Department collectively as the "Department."

11. The Department's failure to adhere to RSA 135-C exposes the Hospitals to an increasing number of false imprisonment claims from Plaintiffs. *See* ECF 75, Counts IV, V, VI, VII. The gist of these false imprisonment claims is that the Plaintiffs were detained unlawfully after the expiration of the three-day period in which a probable cause hearing is required by RSA 135-C:31. In other words, the claims against the Hospitals are grounded on the inaction by the Department, over whom the Hospitals exert no control. The Hospitals' exposure for these additional false imprisonment claims is incalculable at this time, but it is also completely avoidable, if the Department fulfills the statutory obligations of RSA 135-C.

12. The factors the Court examines in deciding whether to issue a temporary restraining order or a preliminary injunction are the same. *Dover Sports, Inc. v. Hockey.com, Inc.*, No. 04-448-JD, 2005 U.S. Dist. LEXIS 46752, at *1-3 (D.N.H. Jan. 28, 2005). These factors are: (1) the moving party's likelihood of success on the merits, (2) the potential for irreparable harm to the moving party if the motion is denied, (3) whether any such harm outweighs the harm that granting the motion would cause the non-moving party, and (4) any effect the ruling would have on the public interest. *Id*. (citing *Charlesbank Equity Fund II, Ltd. P'ship v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004). The Hospitals satisfy each factor.

13. As described in the accompanying Memorandum of Law, the Hospitals are reasonably likely to succeed on the merits of their claim that the Department has and will continue to violate RSA 135-C. The statutory scheme makes the following clear:

- The involuntary emergency admission to the State mental health system occurs upon the completion of the IEA certificate. RSA 135-C:28, I; ECF 148 at 30.
- The Commissioner therefore has the statutory duty to accept persons immediately after an IEA certificate is completed. ECF 148 at 17, 31.

- The Commissioner is required to transfer an IEA patient immediately to the NHH or another DRF upon the completion of an IEA certificate. *Id*. at 31.
- The Commissioner has the statutory duty to provide IEA-certified patients with a probable cause hearing within three days of when an IEA certificate is completed. *Id*. at 31.

There can be no dispute but that the Department has not and is not fulfilling these statutory obligations.

14. The Hospitals and the public have suffered, are suffering and will continue to suffer irreparable harm if an injunction does not issue. Courts grant injunctive relief to prevent on-going, persistent violation of statutes. Injunctive relief is warranted where, as here, there is a record of past harms, as to which the danger of repetition has not been removed, and which continues to have serious repercussions to the moving party and the public. *Lankford v. Gelston*, 364 F.2d 197, 204 (4th Cir. 1966). The Hospitals also face incalculable exposure to false imprisonment claims from the class, all of which are due to the Department's failure to adhere to RSA 135-C. The number of these false imprisonment claims is not presently known or ascertainable; the costs to be incurred by the Hospitals to defend themselves against these claims is likewise impossible to determine; and the amount of any judgments to be paid also is indeterminable. *N.H. Hosp. Ass'n v. Burwell*, 2016 U.S. Dist. LEXIS 31500, *47 (D.N.H. March 11, 2016). That the Hospitals cannot recover from the State on an indemnity theory for the harms suffered by the Hospitals on false imprisonment claims caused by the State all but establishes that the Hospitals' harm is irreparable. *Niles v. Healy*, 115 N.H. 370 (1975) (affirming the dismissal of an indemnity claim against the State).

15. The affidavits accompanying this Memorandum also describe the irreparable human toll suffered as a result of the Department's ongoing statutory violations. The IEA patients are denied the specialized care they deserve upon their transport to a facility capable of

providing the care required. The practitioners within the Hospitals endure the hardship of attempting to stabilize IEA patients that are, by definition, a danger to themselves or others without the specialized resources available at the NHH or a DRF. The Hospitals are required to devote resources to care for these IEA patients for prolonged periods of time and without any indication if or when the IEA patients will be transported out of the Hospital, all of which takes resources away from the Hospitals' efforts to manage their already busy caseloads. The affidavits also demonstrate the significant risk to the public, as IEA patients who are members of the state mental health system and in need of care are discharged back to their communities solely because the Department has not afforded the patient a probable cause hearing within three days. These IEA patients, who are a danger to themselves and/or others, are released into the world without receiving the care the Department is obligated to provide. It only takes one preventable, unfortunate incident after an IEA patient is released to shatter a life. An injunction that does nothing more than gives effect to existing State law addresses all of these irreparable harms.

16. Balancing the equities and public interest also favor the requested injunction. Without the requested injunctive relief, the public will suffer the harms the Legislature intended to prevent when it adopted RSA 135-C. The burden to be imposed on the Department as a result of the requested injunction is no more than the burden the Legislature imposed when it passed RSA 135-C. The Hospitals therefore prevail on this element, like the others, so a temporary restraining order and preliminary injunction should issue.

17. The Hospitals therefore request a temporary restraining order, in a form similar to the proposed order submitted with their Motion, compelling the Department to fulfill the statutory duties imposed by the plain language of RSA 135-C. The Department should be

compelled to transport IEA patients out of the Hospitals' emergency departments upon the signing of an IEA certificate immediately (but in no event more than three days after the signing of the IEA certificate).

WHEREFORE, the Hospitals respectfully request the Court:

A. Issue a temporary restraining order compelling the Commissioner to transport IEA patients out of the Hospitals' emergency departments upon the signing of an IEA certificate immediately (but in no event more than three days after the signing of the IEA certificate);

B. Issue a preliminary injunction compelling the Commissioner to transport IEA patients out of the Hospitals' emergency departments upon the signing of an IEA certificate immediately (but in no event more than three days after the signing of the IEA certificate); and

C. Grant such further relief as justice requires.

Respectfully submitted,

New Hampshire Hospital Association, Alice Peck Day Memorial Hospital, Androscoggin Valley Hospital, Catholic Medical Center, Cheshire Medical Center, Concord Hospital, Cottage Hospital, Elliot Hospital, Frisbie Memorial Hospital, HCA Health Services of New Hampshire (Parkland Medical Center and Portsmouth Regional Hospital), Huggins Hospital, Littleton Hospital Association (Littleton Regional Healthcare), LRGHealthcare (Franklin Regional Hospital and Lakes Region General Hospital), Mary Hitchcock Memorial Hospital, Monadnock Community Hospital, New London Hospital, Southern New Hampshire Medical Center, Speare Memorial Hospital, St. Joseph Hospital, Upper Connecticut Valley Hospital, Valley Regional Hospital, and Weeks Medical Center

By their counsel,

Dated: June 12, 2020

By /s/ Michael D. Ramsdell

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L.R. 7.1 (c) Certification

I hereby certify that prior to the filing of this Motion, an attempt was made by representatives of the Hospitals and their counsel to resolve the dispute presented herein with the State, but those efforts were unsuccessful.

By /s/ Michael D. Ramsdell
Michael D. Ramsdell

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

John Doe, on behalf of himself and all others similarly situated, *et al*,	)	
v.	)	Civil Case. No. 1:18-CV-01039-JD
LORI SHIBINETTE, Commissioner of the New Hampshire Department of Health and Human Services, in his official capacity	)	

INTERVENORS' MEMORANDUM OF LAW SUPPORTING THEIR MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO PREVENT FURTHER STATUTORY VIOLATIONS

The Intervenor Plaintiffs (collectively, "the Hospitals") submit the following Memorandum of Law Supporting Their Motion for Temporary Restraining Order and Preliminary Injunction to Prevent Further Statutory Violations.

I. Introduction.

The Hospitals seek nothing more than the Commissioner's the Department of Health and Human Service's (the "Department") compliance with existing statutory obligations.[1] In Count V of their Amended Complaint (ECF 77), the Hospitals allege that the Department has violated and will continue to violate RSA 135-C:27-33, the involuntary emergency admission scheme. The Commissioner moved to dismiss this and all other claims in the Hospitals' Amended Complaint, but the Court denied the Commissioner's Motion to Dismiss (ECF 148). With the clarity that Count V of the Amended Complaint is a part of this litigation moving forward, the Hospitals seek preliminary injunctive relief to prevent the Department from continuing to violate RSA 135-C. The Hospitals are likely to succeed on the merits of proving the Department's

[1] The Commissioner is the named Defendant in this action. The Hospitals will at times throughout this pleading refer to the Commissioner and the Department of Health and Human Services collectively as the "Department."

regular violations of the statute, so an injunction is warranted to prevent the Department's continued statutory violations. An injunction is also needed to protect the Hospitals from the class's additional false imprisonment claims, which are based entirely on the Department's failure to transport patients out of the Hospitals' emergency departments and conduct probable cause hearings within the prescribed three-day period. An injunction also is necessary to avoid an inevitability – an IEA patient, who by definition has been certified as a danger to himself, herself or others, will be released by State Circuit Court Order because of the Department's statutory violation and following such release will cause serious bodily injury or worse to himself, herself or another.

II. The Commissioner's Obligations Under RSA 135-C.

New Hampshire's Legislature explicitly directed the Department to "establish, maintain, and coordinate a comprehensive, effective, and efficient system of services for persons with mental illness." RSA 135-C:1, I(a); *see also* RSA 135-C:3 (requiring the Department to "establish, maintain, implement, and coordinate a system of mental health services under [RSA 135-C]."). The Legislature established a process under which individuals who are an imminent threat to themselves or others can be admitted involuntarily to the State's mental health system in a process called an "Involuntary Emergency Admission" or "IEA." *See* RSA 135-C:27-33.

The Department directs those who may require an IEA to go first to his/her closest hospital emergency room for examination. The Department's website reads, in part, "New Hampshire Hospital (NHH) provides inpatient psychiatric treatment to patients admitted on an involuntary basis through an emergency admissions process, … [and] [m]ost admissions to NHH are through the Involuntary Emergency Admission (IEA) process (pursuant to NH state law, RSA 135-C:27-33)." However, because "NHH does not provide walk-in emergency or crisis services[,]" a person in need of an IEA is directed to "[c]ontact your local hospital Emergency

Department or the local Community Mental Health Center (CMHC) serving your region of residence for an in-person evaluation." *See* https://www.dhhs.nh.gov/dcbcs/nhh/eligibility.htm (last visited May 28, 2020).

The Commissioner maintains a list of physicians, PAs and APRNs approved to order an individual's involuntary emergency admission by completing an IEA certificate. RSA 135-C:28, I ("The commissioner shall maintain a list of physicians, PAs, and APRNs, as defined in RSA 135-C:2, II-a, who are approved by either a designated receiving facility or a community mental health program approved by the commissioner. The admission may be ordered upon the certificate of an approved physician, approved PA, or approved APRN, …"). The Intervenor Hospitals employ or are affiliated with physicians, PAs and/or APRNs approved by the Commissioner to issue IEA certificates.

When a person who may require emergency mental health services appears in a Hospital's emergency department, the approved physicians, PAs, and/or APRNs are required to apply the standard of RSA 135:27 and if the patient meets the criteria, the medical professionals complete an IEA certificate. RSA 135-C:28. Once an IEA certificate is completed, the patient is deemed admitted to the State mental health services system under the supervision of the Commissioner. RSA 135-C:28, I ("The involuntary emergency admission of a person shall be to the state mental health services system under the supervision of the commissioner….The admission may be ordered upon the certificate of an approved physician, approved PA, or approved APRN….").

Because the IEA patient now is part of the State's mental health system and because the laws require the patient to be transported immediately to a facility that can provide the specialized care warranted by the circumstances, the physician, PA, or APRN promptly attempts

to arrange for the Department to transport the patient to the NHH or another DRF.[2] The law requires that a law enforcement officer take custody of the IEA patient and immediately transport the patient to the NHH or a DRF. RSA 135-C:29, I ("Upon completion of an involuntary emergency admission certificate under RSA 135-C:28, a law enforcement officer shall, except as provided in paragraph II, take custody of the person to be admitted and shall ***immediately*** deliver such person to the receiving facility identified in the certificate.") (emphasis added). However, when space is not available at the NHH or another DRF, the Department requires that the Hospitals hold the IEA patient at their emergency departments until notified by the Department that the patient may be transported to a particular facility. Although admitted to the state mental health system, an IEA patient may spend days or weeks in the Hospitals' emergency department before the Department directs the Hospitals to transport the IEA patient to a DRF.

RSA 135-C:31, I requires that a State Circuit Court conduct a probable cause hearing within three days of the patient's admission into the State mental health system to determine if there was probable cause for the involuntary emergency admission. *Id*. ("Within 3 days after an involuntary emergency admission, not including Sundays and holidays, and subject to the notice requirements of RSA 135-C:24, there shall be a probable cause hearing in the district court having jurisdiction to determine if there was probable cause for involuntary emergency admission."). As demonstrated below, the Department has not arranged for the prompt transportation out of the Hospitals' emergency departments and has not arranged for probable cause hearings within three days, which has caused, is causing, and will continue to cause the Hospitals and the public to suffer irreparable harm.

[2] The Department has contracted with an entity called Northern Human Services to coordinate the placement of IEA patients at the NHH or another DRF. For the purposes of simplifying the Hospitals' Motion, the Hospitals will state that contact is made with the Department or the NHH to attempt to arrange for transfer of the IEA patients out of the Hospitals' facilities.

III. The Plaintiffs' False Imprisonment Claims against the Hospitals and the Imminent Threat of Additional Claims from IEA Patients.

This case commenced with a Complaint filed by specific IEA patients on their own behalf and on behalf of similarly situated individuals who allegedly suffered harm as a result of the fundamental breakdown of the State's involuntary emergency admission process. As against the Commissioner, the Plaintiffs seek redress for violations of their constitutional rights. The Plaintiffs also assert direct claims against several of the Hospitals for damages allegedly arising from their unlawful detention or false imprisonment in the Hospitals' emergency departments because the Department refused to transport the Plaintiffs to the NHH or another DRF in a timely manner. *See* ECF 75, Counts IV, V, VI, VII. The gist of these false imprisonment claims is that the Plaintiffs were detained unlawfully after the expiration of the three-day period in which a probable cause hearing is required by RSA 135-C:31.

The Court certified a class of persons similarly situated to the named Plaintiffs (ECF 149), and it is anticipated that these additional class members will assert similar false imprisonment claims against the Hospitals. As with the pending claims, these additional claims will be based on the Department's refusal to accept into its care those who are part of the State's mental health system upon the signing of an IEA certificate. In other words, the claims against the Hospitals are grounded on the inaction of another party over whom the Hospitals exert no control, the Department. The Hospitals' exposure for these additional false imprisonment claims is incalculable at this time, but it is also completely avoidable, if the Department fulfills the statutory obligations of RSA 135-C.

IV. The Department's Repeated Violations of RSA 135-C Will Persist.

A. The Waitlist of IEA Patients Awaiting Immediate Transfer.

During the month of May 2020, the Department failed to immediately transfer to the

NHH or a DRF an average of 16 IEA patients per day. On most days, more than one IEA patient languished in a Hospital emergency department for more than 3 days without a probable cause hearing.[3] The chart below summarizes the waitlists published by the NHH attached as **Exhibit A**:

Date of Report	**Number of IEA Patients in Queue**	**Number of IEA Patients in EDs Longer than 3 Days[4]**
May 8, 2020	8	0
May 11, 2020[5]	9	0
May 12, 2020	10	1
May 13, 2020	17	1
May 14, 2020	22	0
May 15, 2020	21	4
May 18, 2020	20	10
May 19, 2020	15	6
May 20, 2020	14	4
May 21, 2020	20	1
May 22, 2020	20	1
May 26, 2020	14	3
May 27, 2020	16	2
June 2, 2020	11	1

[3] Since DHHS does not commence the three-day deadline for a probable cause hearing until the IEA patient arrives at the NHH or a DRF, it is likely that many of the IEA patients who remained in a Hospital emergency department for fewer than three days also did not receive a probable cause hearing within three days.

[4] This chart does not count IEA patients located at correctional facilities.

[5] The NHH does not release reports on the weekends.

Date of Report	Number of IEA Patients in Queue	Number of IEA Patients in EDs Longer than 3 Days[4]
June 8, 2020	22	1

See also Aff. of Kathy Bizarro-Thunberg at ¶¶ 3-4 (explaining and authenticating the waitlists). The number of IEA patients waiting for transfer from an emergency department to the NHH or another DRF day after day establishes that the Department has violated and will continue to violate RSA 135-C.

B. The IEA Patients' Experiences at the Hospitals' Emergency Departments.

The Hospitals submit to this Court affidavits from specific Hospitals providing further detail regarding their recent experiences in their emergency departments dealing with IEA patients, who are part of the State's mental health system, but are not promptly transported to the NHH or another DRF. The Court will find accompanying this Memorandum the Affidavit of Jennifer Mulryan, MSW, LISCW, the Director of Psychiatric Emergency Services of Riverbend CMHC (Concord Hospital). For the period from April 30 to May 21, 2020, approved physicians, PAs, and APRNs signed twenty-two IEA certificates for individuals who were imminent threats to themselves or others to warrant involuntary emergency admissions. Mulryan Aff. at ¶ 3. None of the IEA patients was immediately transferred to the NHH or a DRF. *Id.* at ¶ 4. Five of those twenty-two IEA patients were discharged or their IEA certificates were rescinded before the patient was received at the NHH or a DRF because it was determined that involuntary emergency admission was no longer required. *Id*. at. ¶ 5. Seven of the other seventeen IEA patients remained in the emergency department for between five to eight days before they were transported to the NHH or another DRF. *Id*. Over the twenty-two-day period covered by Ms. Mulryan's Affidavit, therefore, the Department failed to satisfy the statutory obligations

regarding twenty-two IEA patients and at least seven IEA patients were denied probable cause hearings within three days at just this one facility.

Southern New Hampshire Medical Center in Nashua ("SNHMC") endured a similar experience as a result of the Commissioner's failures. From April 29, 2020 to June 4, 2020, twenty IEA certificates were signed. Charlene Torrisi Aff. at ¶ 3. None of the IEA patients was immediately transferred to the NHH or a DRF. *Id.* at ¶ 4. Three IEA patients were transferred to voluntary admission status and six additional IEA patients were discharged, all within three days of their IEA certificates being signed. *Id*. at ¶ 5. Of the remaining eleven IEA patients, five remained in the Hospital's emergency department for longer than 3 days from the date of the IEA certificate before they were transported by the Department to the NHH or another DRF. *Id*. These five IEA patients remained in the emergency department from between five to eight days before the Commissioner arranged for their transfer. *Id*. Therefore, the Department failed to satisfy the statutory obligations regarding twenty IEA patients and at least five IEA patients were denied probable cause hearings within three days at SNHMC.

That these IEA patients remained in a Hospital emergency department was not because of SNHMC's lack of diligence. When an IEA certificate is signed at SNHMC, it is promptly faxed to the NHH. *Id*. at ¶ 6. Phone calls are placed by the Hospital to Northern Human Services, the contractor retained by the State to coordinate the placement of IEA patients to NHH or another DRF, every day after the signing of the IEA certificate to try to arrange for the transfer out of the emergency department to a State facility able to provide the care required. *Id*.

A similar process is followed at Concord Hospital to attempt to secure a prompt transfer of each IEA patient. Concord Hospital faxes a copy of each IEA certificate promptly after it is signed to the NHH and other DRFs. Mulryan Aff. at ¶ 6. Staff at the Hospital calls the NHH

every morning thereafter to obtain the State's overall waitlist count and determine the queue number for Concord Hospital's IEA patients. *Id*. It is not uncommon, in the experience of Concord Hospital, that as one of its IEA patients approaches the top of the queue, the NHH asks that the IEA patient be "deferred," which results in the IEA patient remaining in the Hospital's emergency department for additional days. *Id*.

Cottage Hospital was forced to care for an IEA patient for almost two weeks before the Commissioner fulfilled the duties required by statute. Cottage Hospital signed just one IEA certificate from May 4, 2020 to June 4, 2020. Ann Duffy Aff. at ¶ 3. For that one patient, the IEA certificate was signed on May 21, 2020. *Id*. This IEA patient was not transferred to the NHH until June 3, 2020, thirteen days after the certificate was signed. *Id*. The Department therefore failed to satisfy the requirements imposed by law as to this IEA patient. Cottage Hospital diligently tries to arrange for the transfer of each IEA patient after an IEA certificate is signed. *Id*. at ¶ 4. The facility calls Northern Human Services to attempt to arrange for a transfer to the NHH or another DRF. *Id*. Northern Human Services evaluates the IEA patient via tele-psych and places the IEA patient on the waitlist until a bed at the NHH or another DRF is provided to him or her. *Id*. The Hospital's staff checks with Northern Human Services a couple of times each shift to obtain updates for when an IEA patient will be transferred. *Id*. This is a manual and time-consuming process for the Hospital.

Mary Hitchcock Memorial Hospital treated six IEA patients between May 1, 2020 and June 5, 2020. Christine T. Finn, M.D. Aff. at ¶ 3. Five of those six IEA patients remained in the emergency department for longer than three days after the IEA certificate was signed, and the Department therefore failed to fulfill the statutory obligations as to those five individuals last month. *Id*. at ¶ 4. One IEA patient remained within the Hospital for 10 days, during which time

the IEA certificate was renewed three times, before the IEA patient was discharged home. *Id*. at ¶ 5. The other four stayed in the facility four to five days before being transferred to the NHH or another DRF. *Id*.[6] Mary Hitchcock diligently tries to arrange for transportation of an IEA patient after the certificate is signed. The Hospital faxes updates, usually each day, to the Department. *Id*. at ¶ 6. This diligence has not resulted in the Department honoring the statutory requirements.

Weeks Medical Center admitted four patients to its emergency department for whom IEA certificates were signed within a recent thirty-day period. Michael D. Lee, MBA, SPHR, MLA Aff. at ¶ 3. None of the four was immediately transported from the emergency department to the NHH or another DRF. *Id*. at ¶ 4. One IEA patient remained in the emergency department for five days after her IEA certificate was signed and another stayed for eight days after her IEA certificate was signed before the Department transported them to the NHH or another DRF. *Id*. at ¶¶ 3, 5. As with the other Hospitals, Weeks Medical Center persistently attempts to arrange for each IEA patient's transportation from the emergency department. Weeks Medical Center contracts with Northern Human Services to arrange for each patient's referral to the NHH or another DRF. *Id*. at ¶ 6. The Weeks Medical Center inpatient case management team follows up with the NHH or DRFs (if necessary) to ascertain bed availability. *Id*. As the recent experience shows, these efforts do not always result in the prompt transportation of each IEA patient and the Department's violation of law causes harm to the Hospital, the IEA patient and the public.

Cheshire Medical Center has also held IEA patients for longer than three days during the last month. Between May 1, 2020 and June 3, 2020, IEA certificates were signed for thirteen patients in the emergency department at Cheshire Medical Center. Kristen Sovik Aff. at ¶ 3.

[6] The sixth IEA patient agreed to a voluntary admission after the IEA certificate was signed but before three days elapsed, so the involuntary emergency admission was lifted. Christine T. Finn, M.D. Aff. at ¶ 5.

None of the thirteen was transported immediately to the NHH or another DRF. *Id*. at ¶ 4. Four of the thirteen remained in the emergency department longer than three days after their IEA certificates were signed. *Id*. at ¶ 5. For those four IEA patients, their stays in the Cheshire Medical Center emergency department ranged from 4-6 days. *Id*. at ¶ 3.

C. The Dire Consequences of the Department's Failure to Adhere to the Statute.

Another troubling development in the last month is that IEA patients, who are by definition an imminent danger to themselves or others are being released by State Circuit Court judges solely because the Department is not completing probable cause hearings within the 3 days required by law. The Hospitals are aware of two such recent instances both involving patients brought to the Elliot Hospital emergency room. *See* Aff. of Heidi St. Hilaire, MSN, CNL, BSN, RN-BC at ¶¶ 3-6. The first incident involved a patient admitted to the emergency department on May 14, 2020. *Id*. at ¶ 3. This IEA patient stayed in the emergency department for one day and was then transferred to a DRF. *Id*. The probable cause hearing was not scheduled within three days of the signing of the IEA certificate, however. *Id*. A lawyer appointed to represent the interests of the IEA patient informed the State Circuit Court of this Court's order denying the Commissioner's Motion to Dismiss the Plaintiff's Amended Complaint, on which the State Circuit Judge relied to dismiss the IEA petition. *Id*. at ¶ 4; *see also* State Circuit Court Order, attached as **Exhibit B**.

This IEA patient, a danger to himself/herself and/or others was therefore released back into the community, during which time there was an imminent, substantial risk of serious harm to the IEA patient or an innocent person. Not surprisingly, this particular IEA patient came back to Elliot Hospital's emergency department on the next day and it was again determined that an IEA certificate was dictated by the person's mental state. *Id*. at ¶ 5. The entire statutory

involuntary emergency admission process was re-started. *Id*. This time, a probable cause hearing was conducted within the required 3 days. *Id*.

A nearly identical set of circumstances played out between June 4, 2020 and June 9, 2020 with another Elliot Hospital IEA patient, which also resulted in the dismissal of the IEA petition without the State Circuit Court Judge even considering the merits of the petition. This second IEA patient was admitted to the Elliot Hospital emergency department on June 4, 2020, and the IEA certificate was signed that day. *Id*. at ¶ 6. This IEA patient was transferred to a DRF the next day, on June 5, 2020. *Id*. The probable cause hearing was not scheduled to occur until June 9, 2020, which was more than three days after the IEA certificate was signed. *Id*. When the probable cause hearing commenced, before hearing any testimony, the judge found there to be no probable cause because the hearing was not commenced within three days of the signing of the IEA certificate. *Id*. This IEA patient was therefore discharged and released on purely procedural grounds without a hearing on the merits. *Id*. *see also* State Circuit Court Order, attached as **Exhibit C**.

In these two recent instances, the Department's failure to fulfill the requirements of RSA 135-C not only delayed proper care to these IEA patients and exposed Elliot Hospital to false imprisonment claims, but also exposed the patient and innocent third parties to potential serious harm. These circumstances are bound to be repeated unless this Court enjoins the Commissioner immediately.

Since the first instance in which an IEA petition was denied solely because of the untimeliness of the probable cause hearing, Elliot Hospital has tried to induce DHHS to move patients to a DRF and schedule probable cause hearings before the expiration of the three-day requirement. For example, an IEA certificate was signed for a patient on May 31, 2020. *Id*. at ¶

7. This IEA patient was admitted to a DRF on June 2, 2020, but his/her probable cause hearing was not scheduled until June 5, 2020, which would have been 5 days after the IEA certificate was signed. *Id*. Elliot Hospital's Clinical Nurse Manager contacted the State Circuit Court clerk to ask that the probable cause hearing be expedited so that it would occur within three days of the IEA certificate signing. *Id*. The State Circuit Court clerk, however, indicated that the hearings are scheduled based on the date of admission to a DRF (not the date of the IEA certificate). *Id*. In this instance, the lawyer representing the IEA patient did not contest the timeliness of the probable cause hearing, so this patient received a hearing on the merits. Even though the Hospital has taken it upon itself to attempt to remedy the Department's statutory violations, the Hospital lacks the power or control to do so and it remains exposed for claims despite its efforts to protect itself.

In another instance, this one involving a minor IEA patient admitted to the Pediatric Inpatient Service department at Mary Hitchcock Hospital, a lawyer representing the minor IEA patient resorted to filing a Petition for Habeas Corpus to attempt to extricate the minor IEA patient on the grounds asserted in this litigation. As the Affidavit of Katherine Shea details, a minor patient was admitted to Mary Hitchcock Hospital on June 5, 2020, and an IEA certificate was signed that day. Shea Aff. at. ¶ 3. The Hospital diligently tried to arrange for the minor IEA patient's transfer to the NHH or another DRF, but the Hospital's request was denied. *Id*. No probable cause hearing was scheduled for this patient by June 8, 2020, at which point this minor patient's parents hired a lawyer. *Id*. The lawyer filed a Petition for Writ of Habeas Corpus with the Grafton County Superior Court. *Id*.; *see* Petition for Habeas Corpus, attached hereto as **Exhibit D**. The habeas corpus petition asserts the same arguments presented in this litigation, which align with this Court's prior rulings on the Commissioner's Motions to Dismiss. Exhibit

D at ¶¶ 7, 11-12, 15. The minor patient's parents removed the minor patient from the emergency department, against the recommendations of the providers, on June 9, 2020. Shea Aff. at ¶ 5. A hearing was scheduled on the Petition for Habeas Corpus for June 12, 2020. *Id*. As the minor patient had been removed from the emergency department before the hearing, Mary Hitchcock Hospital requested that the hearing be cancelled, but the family insisted it go forward so they could seek an award of attorneys' fees against the Hospital. *Id*. This vignette further demonstrates that without an immediate injunction from this Court, IEA patients throughout the State will continue to advance legal arguments resulting in their release simply on procedural grounds and without any examination of the merits of whether involuntary emergency admission is in their best interests. This is precisely the scenario that RSA 135-C:27-33 was intended to avoid.

D. The Evidence Shows the Department's Repeated Statutory Violations Will Continue.

The affidavits and the NHH waitlists, compiling instances from just the last several weeks, demonstrate that the Department has not fulfilled the requirements imposed by RSA 135-C. The number of daily violations establishes that the Department's noncompliance will continue unless this Court enjoins the conduct. If the status quo persists, IEA patients will not receive the care as directed by the Legislature; the Hospitals will continue to be unlawfully overburdened as a result of the Department's dereliction of duty; and for good measure the IEA patients will assert claims against the Hospitals for alleged unlawful detentions they are powerless to prevent. It should not require serious bodily harm or worse to an IEA patient or another person following an IEA patient's release because of the Department's statutory violations to secure the Department's compliance with plain and well-established statutory requirements.

V. The Standard for a Temporary Restraining Order and Preliminary Injunctive Relief.

The factors the Court examines in deciding whether to issue a temporary restraining order and whether to issue a preliminary injunction are the same. *Dover Sports, Inc. v. Hockey.com, Inc.*, No. 04-448-JD, 2005 U.S. Dist. LEXIS 46752, at *1-3 (D.N.H. Jan. 28, 2005). These factors are: (1) the moving party's likelihood of success on the merits, (2) the potential for irreparable harm to the moving party if the motion is denied, (3) whether any such harm outweighs the harm that granting the motion would cause the non-moving party, and (4) any effect the ruling would have on the public interest. *Id*. (citing *Charlesbank Equity Fund II, Ltd. P'ship v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004); *Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 73 (1st Cir. 2004)); *see also Nw. Bypass Grp. v. United States Army Corps of Eng'rs*, 453 F. Supp. 2d 333, 337 (D.N.H. 2006). While all four factors must be considered, "[t]he sine qua non of this four-part inquiry is likelihood of success on the merits." *Contour Design, Inc. v. Chance Mold Steel Co.*, 2010 DNH 11 (quoting *New Comm Wireless Servs. v. SprintCom, Inc.,* 287 F.3d 1, 9 (1st Cir. 2002)).

VI. The Hospitals Are Likely to Succeed on the Merits of their Claim that the Commissioner has Violated and Will Continue to Violate RSA 135-C.

The Hospitals' position is rooted in the plain language of the words used by the Legislature. This Court recently relied upon the plain language of RSA 135-C when it denied the Commissioner's Motion to Dismiss the Hospitals' Amended Complaint (ECF 148). The statutory scheme makes the following clear:

- The involuntary emergency admission to the State mental health system occurs upon the completion of the IEA certificate. RSA 135-C:28, I; ECF 148 at 30.
- The Commissioner therefore has the statutory duty to accept persons immediately

after an IEA certificate is completed. ECF 148 at 17, 31.

- The Commissioner is required to transfer an IEA patient immediately to the NHH or another DRF upon the completion of an IEA certificate. *Id*. at 31.
- The Commissioner has the statutory duty to provide IEA-certified persons with a probable cause hearing within three days of when an IEA certificate is completed. *Id*. at 31.

There can be no dispute but that the Commissioner has not and is not fulfilling these statutory obligations.[7] The affidavits provided with this Memorandum, which are summarized *supra*, tell the stories of patients impacted by the Department's refusal to comply with the statute and convey the stress placed on the Hospitals' practitioners who occupy the front lines of these human dramas. The Department often instructs or otherwise compels the Hospitals to retain patients of the State mental health system indefinitely. This is not an academic exercise for those involved and the stakes are high. The affidavits describe repeated instances of the Department refusing to transport patients for whom IEA certificates have been signed to the NHH or another DRF.

The affidavits also recount examples of instances in which IEA patients do not receive their probable cause hearings within the prescribed three-day period. In some instances, lawyers advocating for the IEA patients pointed to this Court's order denying the Commissioner's Motion to Dismiss the Plaintiffs' Amended Complaint to successfully convince a State Circuit Court Judge to dismiss the IEA petition simply on the grounds that the Department failed to convene the probable cause hearing within three days of the signing of the IEA certificate. In other words, IEA patients are being released from the Hospitals' care not on the merits of

[7] In the Motion to Dismiss, the Commissioner took the position that she is not obligated to fulfill these tasks; she did not contend that she is in fact completing them.

whether involuntary emergency admission is warranted but because of a procedural deficiency occasioned by the Department's refusal to comply with explicit State law.

The snapshot of information conveyed by the affiants, focused on a timeline commencing at and following this Court's denials of the Commissioner's motions to dismiss, demonstrates that the Department's violations will persist unless and until this Court orders the Department to honor the Legislature's directives. This recent experience establishes that the pattern will perpetuate – more IEA patients will be released despite needing care simply because the Department continues to violate the law. The requested temporary restraining order and preliminary injunction seek nothing more than the execution of the Legislature's directive – to accept IEA patients into the State mental health system, transfer them to the NHH or a DRF, provide them with the specialized care they need and deserve, and afford IEA patients a probable cause hearing within three days.

VII. The Hospitals and the Public Have Suffered, Are Suffering, and Will Continue to Suffer Irreparable Harm.

Courts grant injunctive relief to prevent on-going, persistent violation of statutes. That rule should be employed here as the Department's disregard of RSA 135-C will continue unabated without a temporary restraining order and preliminary injunction. In *Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421 (E.D. Mo. March 6, 1985), for example, the plaintiffs demonstrated that the United States Department of the Interior violated a statute pertaining to the issuance of permits to sell concessions within national parks. They demonstrated that some permit applicants were harmed and they would continue to be harmed by the agency's illegal conduct. Where a party establishes a likelihood of prevailing in showing a violation of statute, the party need not establish irreparable injury, because irreparable harm to the public is presumed. *Id*. at 427 ("In actions to enjoin continued violations of federal statutes,

once a movant establishes the likelihood of prevailing on the merits, irreparable harm to the public is presumed."). The presumption is rebuttable, and in this instance, the burden falls upon the Commissioner to demonstrate that the harm is not irreparable. *Id*. s*ee also Sikeston Production Credit Assoc. v. Farm Credit Admin*., 647 F. Supp. 1155, 1163 (E.D. Mo. October 14, 1986) ("Additionally, irreparable harm to the public and to the movants is presumed in this case because equitable requirements are satisfied per se when a violation of Federal law, including the Administrative Procedure Act, is shown."). Absent such a rebuttal by the Department, the injunction should issue to prevent further violations of the statute.

The same rule was applied in *Cmty. Nutrition Inst. v. Butz*, 420 F. Supp. 751 (D.D.C. 1976). In that case, the plaintiffs sought to enjoin the United States Department of Agriculture from violating the Administrative Procedure Act ("APA") when the department promulgated a regulation without proper notice. The Court found those plaintiffs likely to prove a violation of the APA and also found that the failure to adhere to the statute deprived the plaintiffs of the right to participate in the rulemaking process. *Id*. at 757. The violation of the APA could not be cured retroactively and the harm therefore would persist if the regulation was allowed to take effect. Similarly, here, the Department's statutory violations will persist unless this Court compels compliance with RSA 135-C. *See also Heublein, Inc. v. Federal Trade Com*., 539 F. Supp. 123, 128 (D. Conn. March 16, 1982) ("Hence, irreparable harm to the public and to Heublein is presumed in this case because equitable requirements are satisfied per se when a violation of federal law is shown since, in enacting the statute, Congress declared that violations of the statute are contrary to the public interest and, therefore, cause irreparable harm."); *Lathan v. Volpe*, 455 F.2d 1111, 1116 (9th Cir. 1971); *Sierra Club v. Coleman*, 405 F. Supp. 53, 54-55 (D.D.C.1975).

Injunctive relief is warranted where, as here, there is a record of past harms, as to which the danger of repetition has not been removed, and which continues to have serious repercussions to the moving party and the public. *Lankford v. Gelston*, 364 F.2d 197, 204 (4th Cir. 1966). In *Lankford*, the police commissioner authorized warrantless searches of over 300 premises based on uncorroborated anonymous tips, process that violated the constitutional rights of those whose homes were searched. The premises owners sought an injunction to prevent the ongoing warrantless searches that lacked probable cause. The court felt a grave obligation to ensure that similar constitutional violations would not recur and therefore issued an injunction. *Id*. at 201 ("If denying relief in these circumstances should be held a proper exercise of judicial restraint, it would be difficult to envision any case justifying judicial intervention."). The stakes are no less important here and an injunction should issue to prevent the Department's repeated violations of RSA 135-C.

The Hospitals also face incalculable exposure to false imprisonment claims from the class, all of which are due to the Department's failure to adhere to RSA 135-C. The number of these false imprisonment claims is not presently known or ascertainable; the costs to be incurred by the Hospitals to defend themselves against these claims is likewise impossible to determine; and any judgments to be paid (if the Plaintiffs prevail, which the Hospitals do not concede) is also indeterminable. The financial harm to the Hospitals is unknowable, which is the hallmark of an irreparable harm against which injunctions are designed to protect. The court in *McCormack v. Heideman*, 2011 U.S. Dist. LEXIS 107823, *21-22 (D. Idaho Sept. 23, 2011) found there to be irreparable harm where the plaintiff faced the continued threat of prosecution under a statute the court found to be invalid. The Hospitals face a similar fate in this case without an order compelling the Department to fulfill the statutory duties – continued threat of

prosecution of false imprisonment tort claims by an ever-growing population of IEA patients whom the Department fails to transport out of emergency departments.

If the Commissioner argues that the yet unquantifiable false imprisonment claims could someday be liquidated, this Court should still find the harms to be irreparable. This Court found as such in *N.H. Hosp. Ass'n v. Burwell*, 2016 U.S. Dist. LEXIS 31500, *47 (D.N.H. March 11, 2016). That case turned on money, the recoupment of overpayments by the Department, but the Court still granted an injunction to protect against imminent, substantial injury. *Id*. ("Yet, it has also been recognized that some economic losses can be deemed irreparable."). It is not enough that the forthcoming false imprisonment claims someday might be reduced to a money judgment. The Hospitals will suffer tremendous harm in the process of caring for IEA patients who are part of the State's mental health system just to be rewarded by incurring costs and attorneys' fees defending tort claims not of their own making.

That the Hospitals cannot recover from the State on an indemnification theory for the harms suffered by the Hospitals on false imprisonment claims caused by the State all but establishes that the Hospitals' harm is irreparable. *Niles v. Healy*, 115 N.H. 370 (1975) (affirming the dismissal of an indemnity claim against the State); *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 222 (1st Cir. 2003) ("The unavailability of back pay or other monetary damages against either the Commonwealth [Puerto Rico] or the defendants in their official capacities goes a long way toward establishing irreparable injury.*"); Itek Corp. v. First Nat'l Bank of Boston*, 730 F.2d 19, 22 (1st Cir. 1984).

The affidavits accompanying this Memorandum also describe the irreparable human toll suffered as a result of the Department's ongoing statutory violations. The IEA patients are denied the specialized care they deserve when they should be transported to a facility capable of

providing the care required. The practitioners within the Hospitals endure the hardship of attempting to stabilize IEA patients that are, by definition, a danger to themselves or others, without the specialized resources available at the NHH or a DRF. The Hospitals are required to devote resources to care for these IEA patients for prolonged periods of time and without any indication as to if or when the IEA patients will be transported out of the Hospital, all of which takes resources away from the Hospitals' efforts to manage their already busy caseloads. The affidavits also demonstrate the significant risk to the public, as IEA patients in need of care are discharged back to their communities solely because the Department has not afforded the patient a probable cause hearing within the required three days. These IEA patients, who are a danger to themselves and/or others, walk out of the Hospitals' emergency departments and into the world without receiving the care the Department is obligated to provide. It only takes one preventable, unfortunate incident after an IEA patient is released on this technicality to shatter a life. An injunction here does nothing more than gives effect to existing State law and addresses all of these irreparable harms.

VIII. Balancing the Equities and Public Interest Augurs in Favor of the Requested Injunction.

Without the requested injunctive relief, the public will suffer the harms the Legislature intended to prevent when it adopted RSA 135-C. The statute embodies the public's interest in a well-functioning IEA process. The cases cited at pages 17-20, *supra*, address circumstances in which a party continues to violate a statute, and courts issued injunctions to protect the public against the ongoing harms suffered from the statutory violations. The burden to be imposed on the Department as a result of the requested injunction is no more than the burden the Legislature imposed when it passed RSA 135-C. The Hospitals therefore prevail on this element, and the others, so a temporary restraining order and preliminary injunction should issue.

IX. Conclusion.

The Hospitals therefore request a temporary restraining order, in a form similar to the proposed order submitted with their Motion, compelling the Commissioner and Department to fulfill the statutory duties imposed by the plain language of RSA 135-C. The Commissioner and Department should be compelled to transport IEA patients out of the Hospitals' emergency departments upon the signing of an IEA certificate immediately (but in no event more than three days after the signing of the IEA certificate).

WHEREFORE, the Hospitals respectfully request the Court:

A. Issue a temporary restraining order compelling the Commissioner to transport IEA patients out of the Hospitals' emergency departments upon the signing of an IEA certificate immediately (but in no event more than three days after the signing of the IEA certificate);

B. Issue a preliminary injunction compelling the Commissioner to transport IEA patients out of the Hospitals' emergency departments upon the signing of an IEA certificate immediately (but in no event more than three days after the signing of the IEA certificate); and

C. Grant such further relief as justice requires.

Respectfully submitted,

New Hampshire Hospital Association, Alice Peck Day Memorial Hospital, Androscoggin Valley Hospital, Catholic Medical Center, Cheshire Medical Center, Concord Hospital, Cottage Hospital, Elliot Hospital, Frisbie Memorial Hospital, HCA Health Services of New Hampshire (Parkland Medical Center and Portsmouth Regional Hospital), Huggins Hospital, Littleton Hospital Association (Littleton Regional Healthcare), LRGHealthcare (Franklin Regional Hospital and Lakes Region General Hospital), Mary Hitchcock Memorial Hospital, Monadnock Community Hospital, New London

Hospital, Southern New Hampshire Medical Center, Speare Memorial Hospital, St. Joseph Hospital, Upper Connecticut Valley Hospital, Valley Regional Hospital, and Weeks Medical Center

By their counsel,

Dated: June 12, 2020

By /s/ Michael D. Ramsdell

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